

AUG 21 1979

MICHAEL ROBAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

J.R. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

STUART E. SCHIFFER
*Acting Assistant Attorney
General*

ELOISE E. DAVIES
*Attorney
Department of Justice
Washington, D.C. 20530*

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1774

J.R. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Temporary Emergency Court of Appeals (Pet. App. B7-B23) are reported at 598 F. 2d 594 and 600.

JURISDICTION

The judgments of the Temporary Emergency Court of Appeals were entered on March 5, 1979, and March 29, 1979. That court's orders denying petitioners' motions to vacate the judgments (Pet. App. A2, A3) were entered on May 18, 1979. The petition for a writ of certiorari was filed on May 29, 1979. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, as incorporated in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1).

QUESTIONS PRESENTED

1. Whether this case is moot.
2. Whether an unexecuted civil administrative subpoena issued by the Department of Energy prior to referral of the case by that Department to the Department of Justice for criminal prosecution may be enforced after such referral.

STATEMENT

On March 31, 1975, the Department of Energy (DOE) began a civil investigation of petitioner Adams to determine whether amounts Adams received from the sales of certain petroleum products were in compliance with applicable pricing regulations (Pet. App. B7-B8). On March 8, 1978, DOE issued a subpoena duces tecum to petitioner First City National Bank (Bank), requesting that certain documents in the Bank's possession¹ be turned over by March 23, 1978 (*id.* at B8-B9). The Bank refused to deliver most of the documents. On July 12, 1978, the government filed a petition in the United States District Court for the Western District of Texas to enforce the subpoena (*id.* at B10).

On November 17, 1978, after an evidentiary hearing in which petitioner Adams was allowed to participate as an intervenor, the district court entered an order enforcing those provisions of the subpoena with which the Bank had not complied (Pet. App. B2). On December 8, 1978,

¹The documents subpoenaed were records of various transactions of James Cardwell and Gilbert R. Russell, who had testified before DOE that they had received checks from petitioner Adams (Pet. App. B8-B9).

The subpoena was issued under Section 206 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1); Section 13 of the Federal Energy Administration

the Bank delivered the subpoenaed documents to the court pursuant to the enforcement order, and the court placed them under seal pending appeal.

On March 5, 1979, the Temporary Emergency Court of Appeals (TECA) affirmed the district court's order and directed prompt enforcement (Pet. App. B7-B17). On March 29, 1979, TECA denied all relief sought by petitioners in a joint appeal from the district court's denial of various post-hearing motions (*id.* at B18-B23, B-26). On April 27, 1979, the court denied a petition for rehearing with suggestion of rehearing en banc (*id.* at B24).

Meanwhile, on April 25, 1979, petitioners moved TECA to vacate its judgments entered on March 5 and March 29, on the ground that DOE had referred the matter to the Department of Justice for criminal investigation. An affidavit of a Department of Justice attorney submitted by petitioners stated that the referral was received by the Department on February 6, 1979. Petitioners contended that the criminal reference precluded enforcement of the civil subpoena. On May 18, 1979, TECA denied the motions, noting that they were "completely without merit" and should be "stricken for attempted delay of subpoena enforcement" (Pet. App. A2, A3).²

After the petition for certiorari in this case was filed, the grand jury investigating the matter issued a subpoena duces tecum for the documents that were the subject of the civil subpoena.

Act of 1974, 15 U.S.C. 772; Sections 645 and 705 of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 599, 606 (to be codified at 42 U.S.C. 7255 and 7295); and 10 C.F.R. 205.8 and 205.201 (Pet. App. B12).

²TECA's mandates have issued but the documents remain in the district court's custody.

ARGUMENT

1. Because the documents in question have been subpoenaed by the grand jury, the civil subpoena will not be enforced.³ This case is therefore moot. Petitioners are of course free, if they choose, to raise in the district court whatever legal arguments they may have against enforcement of the grand jury subpoena.

2. Even disregarding the issuance of the grand jury subpoena, the judgment of TECA is correct. There is no conflict between TECA's holding and any decision of this Court, and further review is unwarranted.

Enforcement of this subpoena would not have conflicted with *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), on which petitioners rely (Pet. 6). In *LaSalle* this Court stated (437 U.S. at 318) that an administrative subpoena will be enforced if it is issued before any referral for criminal prosecution is made to the Department of Justice and if it is issued in good faith in pursuit of congressionally authorized goals.⁴ The DOE subpoena was issued on March 8, 1978, with a return date of March 23, 1978 (Pet. App. B8-B9). The criminal referral did not take place until February 6, 1979, eleven months later. Moreover, the subpoena was issued in pursuit of a congressionally authorized goal—to determine whether violations of laws administered by DOE

had occurred in the pricing of petroleum products (*id.* at B7-B8). Petitioners do not contend that the subpoena was issued in bad faith. See *United States v. LaSalle National Bank*, *supra*, 437 U.S. at 313; *United States v. Powell*, 379 U.S. 48, 57-58 (1964). TECA determined that the investigation was conducted "pursuant to a legitimate purpose" (*Powell*, *supra*, 379 U.S. at 57), that the information sought was not already in DOE's possession (as the Bank had claimed), and that DOE was acting within its statutory authority (Pet. App. B14-B16).

Petitioners' claim here is thus reduced to the assertion that the subpoena, although duly issued in the course of a proper DOE investigation, may not now be enforced because, while petitioners' appeals from the district court's enforcement order were pending, the case was referred for criminal prosecution. But "[t]he rights and obligations of the parties became fixed when the [subpoena] was served." *Couch v. United States*, 409 U.S. 322, 329 n.9 (1973). If petitioners' position were correct, those who suspect that an administrative investigation will lead to criminal prosecution would be able, and encouraged, to evade civil discovery through resort to dilatory court proceedings until a criminal referral occurred.⁵

The enforcement of the unexecuted subpoena, which was repeatedly ordered by the district court and TECA, in no way would have interfered with petitioners' Fifth Amendment right to be prosecuted only on indictment of a grand jury (Pet. 7-12). Even before the grand jury issued its subpoena (see page 3, *supra*), the administrative

³There would, however, be no impropriety in simultaneously pursuing authorized civil and criminal remedies. *United States v. Kordel*, 397 U.S. 1 (1970).

⁴See also *Donaldson v. United States*, 400 U.S. 517, 536 (1971): "[A]n internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."

⁵As the court below stated (Pet. App. B23; citation omitted): "[T]he underlying public interest in such a vital source of energy for our day as oil calls for prompt enforcement of the subpoena in question."

investigation had come to an end, and the criminal investigation was proceeding in the grand jury under the supervision of the Department of Justice. The Department would not have permitted post-referral use of DOE's subpoena authority to procure evidence for its criminal case. Cf. *United States v. LaSalle National Bank, supra*, 437 U.S. at 312, and the grand jury's role in the criminal action would not have been subverted by delivery to the United States Attorney of the subpoenaed documents.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
*Acting Assistant Attorney
General*

ELOISE E. DAVIES
Attorney

AUGUST 1979